



KAPLAN KIRSCH ROCKWELL

February 8, 2011

Matthew Cohn
Supervisory Enforcement Attorney
Environmental Protection Agency
Via email

Re: Draft AOC Involving Park City, UT and United Park City Mines

Dear Matt:

On behalf of Park City, I am writing to bring to your attention a critical issue raised by the 2/2/11 Draft AOC transmitted to Park City by email on February 3, 2011. Park City looks forward to the negotiation session scheduled for Wednesday, February 9 regarding the AOC and wishes to make the session productive. Because the draft indicated it had not been reviewed or approved by management officials, the City writes at this time to ask that review by EPA management take into account an extraordinary issue that stands in the way of finalizing what may otherwise be a landmark agreement.

I refer to ¶ 111, the claims waiver provision. (Certain other paragraphs raise the same or related points, but for purposes of this letter, I will focus on ¶ 111.) As currently drafted, it contains two kinds of very sweeping prohibitions against the City's future exercise of fundamental regulatory authority and police powers. The last sentence of ¶ 111 would prohibit the City from taking "administrative or municipal undertakings or actions" and from making "statements" to the public and the media or "representations" to other governmental entities related to environmental or contaminant issues at the Site or anywhere within two watersheds above the Site.

In translation, the City would be prevented, forever, from responding to citizen inquiries about water quality and soil contamination or public health hazards in much of the City limits. A fair reading of the language would also prevent the City from exercising its own regulatory enforcement and police power to, for example, condition future development on appropriate clean-up and adherence to City ordinances.

It is a basic legal principle that a municipality cannot bargain away or divest itself of the right to exercise the police power whenever it becomes necessary to conserve the health, safety or welfare of the community; any attempt to do so is simply unenforceable. 2A McQuillin Mun. Corp. §§ 10:41, 29:11 (3rd ed.); *Warm Springs Co. v. Salt Lake City*, 165 P. 788, 790 (1917). Even if it were possible to accept the contractual restrictions on these powers under ¶ 111, it is impossible for me to explain to my client the basis on which EPA could ask the City to accept language so detrimental to its citizens, to public health and the environment, and to bind future City leadership to accept such limitations in perpetuity. Such a "gag order"

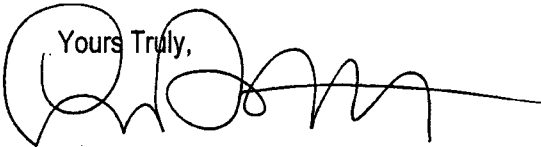
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as is proposed in ¶ 111 is unprecedented in my experience and contrary to everything that Administrator Lisa Jackson talks about when she gives her inspiring talk on EPA at 40. Simply stated, the City not only cannot agree to these restrictions, it cannot fathom that such language would spring from or be tendered by EPA.

The second type of sweeping prohibition in ¶ 111 is the broad geographic scope of the proposed waiver of all claims Park City may have against UPCM stemming from releases of hazardous substances or pollutants. We understand that it is customary to waive claims against fellow respondents and other persons within the geographic scope of the Site or with respect to the specific work that is the subject of an AOC. That is the concept embodied in EPA Guidance on Model AOCs (Jan. 30, 2007), in my experience and that of my colleagues, and in EPA's draft AOC transmitted on December 2, 2010. But the 2/2/11 Draft would extend the claims waiver to two complete watersheds above and outside of Site boundaries – watersheds in which piles of mine tailings remain after 150 years of mining, watersheds where evidence shows that significant metals loading is being contributed to surface and groundwater, watersheds that contain five sites that the Utah Department of Environmental Quality has recommended for CERCLIS listing but where no listing or regulated cleanup has occurred, watersheds where no work will be done under the AOC. Again, it is not possible to understand why from a public policy standpoint EPA would want to erect a permanent barrier to the City's ability to request and to require compliance with laws that exist to protect human health and the environment. We understand that UPCM desires this kind of immunity from City claims, but we cannot see why EPA would favor granting such sweeping immunity at the risk of the public and the environment, when custom and practice is to tailor a claims waiver to the Site at issue in the AOC, where the risks are known and are in the process of being addressed by the work prescribed in the AOC.

Because ¶ 111 raises such fundamental, troubling policy issues for the City, I write in advance of the Wednesday meeting to request careful management attention during its review of this document, and your own re-review of this provision. Thank you in advance for your time. Be assured that Park City stands ready to negotiate in good faith on an AOC, but that it cannot compromise its municipal functions and governmental role in the unprecedented manner being asked of it by the current draft language of ¶ 111.

Yours Truly,

A handwritten signature in black ink, appearing to be 'Lori Potter', written over the 'Yours Truly,' text.

Lori Potter

cc: Mike Gaydosh
Carol Campbell
Mayor Dana Williams
Council Member Liza Simpson
City Manager Tom Bakaly
Deputy City Attorney Thomas Daley
Joan Card, Environmental Regulatory Affairs Manager